STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1100
A08-1163

Energy and Moisture Control Company, LLC,
Respondent (A08-1100),
Appellant (A08-1163),

vs.

Anne Erickson, et al.,
Appellants (A08-1100),
Respondents (A08-1163),

John Doe, et al.,
Defendants.

Filed May 19, 2009
Affirmed in part and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CV-06-16626

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Considered and decided by Ross, Presiding Judge; Toussaint, Chief Judge; and Johnson, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

These consolidated appeals concern a dispute that ignited when the president of a lighting contracting company discovered files left on the computers of two managers who suddenly quit their employment. The discovery convinced the company that the two departing employees had been competing with the company for a contract with one of its prospective clients. A jury found that the employees breached their fiduciary duty and interfered with the company's prospective business relationship, awarding damages for the company's lost profits. But the district court entered judgment only on the company's claim of interference with a prospective business relationship, not breach of fiduciary duty, giving no reason for the omission.

Both sides claim error. The former employees insist that the company is entitled to no damages for its effort to obtain the lost contract with the prospective client because, according to the employees, that contract would have been illegal. They also complain that a portion of the damages awarded includes a clerical error. The company argues that the district court erred by refusing to enter judgment for breach of fiduciary duty and that legal and procedural mistakes at trial led to an incorrectly low damages award. It also contends that the district court erroneously awarded only $1,000 of their $11,604 forensic expert fee.

Because the former employees failed to prove that the purported deficiency inhibiting the company's proposed contract with the prospective client would have doomed the company's planned business relationship, we affirm the district court's

judgment for interference with a prospective business relationship. Because the company's various claims of mistake regarding the jury instructions, special verdict form, and special verdict responses rest on unpersuasive contentions and a faulty legal premise, we affirm the district court's denial of the company's motion for a new trial. And because the district court acted within its discretion when it determined the reasonableness of forensic expert fees, we affirm its award of costs. But because the district court gave no reason for disregarding the jury's finding of breach of fiduciary duty and the record supports that finding, and because the parties agree that damages were calculated inaccurately, we remand for the district court to amend the judgment in favor of the company for breach of fiduciary duty and to resolve the arithmetical error.

FACTS

The facts giving rise to this dispute are not complex. Energy and Moisture Control Company, L.L.C., employed Anne Erickson and Richard Buendorf as project manager and sales manager, respectively. EMC sent Erickson and Buendorf to California to examine a Best Buy distribution center where EMC hoped to secure a contract to design and install a lighting system. When they returned, Erickson and EMC's President Jerry Johnson discussed whether EMC would submit a bid to perform electrical work at the site. Despite knowing of EMC's interest in preparing a bid, Erickson did not prepare one on EMC's behalf.

About one month after Erickson and Buendorf's exploratory trip to California on EMC's behalf, they both suddenly resigned their jobs at EMC, effective immediately. The company soon learned the lucrative reason for the abrupt departure. EMC searched

the files on Erickson's company laptop computer to find that in the month before their resignation, doing business as "Anne Erickson, L.L.C.," Erickson and Buendorf prepared and submitted their own bid to Best Buy. It found other incriminating documents that indicated that Erickson and Buendorf had begun soliciting Best Buy soon after their return from California, and it later determined that their efforts had culminated in Best Buy's agreement that Anne Erickson, L.L.C., would perform the electrical installation for $678,500. After Best Buy learned that it was the subject of the tug-of-war between EMC and its former managers, it decided not to contract with either faction.

EMC sued Erickson and Buendorf, bringing five claims: breach of fiduciary duty, unfair competition, misappropriation of trade secrets, misappropriation of confidential business information, and interference with EMC's prospective business relations. The district court disposed of three of the claims by summary judgment, leaving only breach of fiduciary duty and interference with prospective business relationship for a jury trial.

After trial but before instructing the jury, the district court entertained arguments over several areas of dispute. The related concerns centered on whether a claimant could recover for both causes of action, whether the claims overlapped, and whether the jury would be confused about the similar questions necessary to determine the fate of both claims. The district court revised the special verdict form, but it expressed concern whether the form, comprised of 16 questions in five sections, best framed the questions for jury resolution. EMC's attorney objected to the special verdict form, arguing that it was unintelligible and possibly internally inconsistent. The district court overruled the

objection, instructed the jury, and sent the jury to deliberate and to decide the facts using the revised verdict form.

Jurors interrupted their deliberation with two substantive questions about the verdict form. The jury's first question was without controversy and easily answered, but the second prompted the district court, after consulting with the attorneys, to instruct the jury not to answer one of the questions on the verdict form. The jury's question was, "Do you mean a profit margin known and identified by Best Buy? Would this include the case where Best Buy did not detect and recognize the fact that there was profit margin in the bid?" The stricken verdict-form question was, "Is it reasonably probable that EMC would have gotten the [Best Buy] contract with a project manager profit margin if Erickson would have bid on it for EMC and had included a profit manager profit mark-up in the bid?" After the district court struck the question, EMC's attorney moved for a mistrial. The district court denied the motion.

The jury returned its special verdict, answering all questions except the one they were directed not to answer. The district court identified what it deemed to be "problems" and "inconsistencies" in the jury's findings. It noted that the problems appeared to be related to the verdict form and to the question removed from the jury's consideration. The district court determined that the problems were not fatal, and it ordered judgment in favor of EMC in the amount of $38,124.38, plus costs and disbursements, for interference with prospective business advantage. The district court's judgment did not include EMC's claim that Erickson and Buendorf had breached their fiduciary duty to the company, despite the jury finding that they had.

After trial, the district court allowed Erickson and Buendorf to amend their answer to add the affirmative defense that illegality prevented EMC from recovering damages for interference with prospective business advantage. Although the district court allowed the amendment, it ruled that the defense did not prevent EMC's recovery. Both parties brought motions for posttrial relief, which the district court denied.

EMC appeals, as does Erickson and Buendorf. We have consolidated the appeals.

D E C I S I O N

I

Erickson and Buendorf argue that because EMC was not licensed to perform electrical work in California, the company could not recover for interference with its prospective business relationship because an enforceable contract between EMC and Best Buy for electrical work would have required EMC to have a contracting license in California, which EMC lacked and could not obtain. They maintain that because EMC's prospective contract would have been illegal, EMC cannot prevail on the claim. EMC counters, contending first that Erickson and Buendorf should not have been permitted to amend their answer to include the defense and second, that being unlicensed does not bar its recovery.

We will not disturb the district court's decision allowing Erickson and Buendorf to amend their answer to include the defense. Allowing a party to amend a pleading is a matter for the district court's discretion. *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004). We see no abuse of discretion in the district court's decision.

We are not persuaded by EMC's claim that the district court abused its discretion. EMC asserts that the motion to amend was untimely and the amendment caused prejudice. But the district court addressed the timing of the motion. It acknowledged the untimeliness of the motion to amend, but reasoned that it should permit the amendment because the defense asserted had been "adequately addressed by the evidence that was admitted at the trial." It observed that EMC had notice before trial that California licensure might be an issue and that even without a motion to amend the district court could have considered the defense sua sponte. These reasonable considerations by the district court belie EMC's claim that the amendment "dramatically transformed the defense of EMC's causes of action." The district court appropriately weighed factors that bear on whether, in its discretion, the late motion should bar the amendment.

The district court also reasonably disregarded EMC's claim of prejudice. It gave both sides an opportunity to brief the issue, and the only salient facts bearing on the strength of the defense—whether EMC was licensed in California and whether it could be—are addressed sufficiently in the record. James Beck, one of EMC's owners, admitted that the company had never held a California electrical contractor's license. And the record establishes that the California Contractors State Licensing Board does not license limited liability companies, so EMC could not have obtained the necessary California licensure. No additional facts were necessary to resolve the legal issue that arises from the newly asserted defense. The district court was able to decide the legal issue, as will we, without needing any additional factual development. We hold that the district court did not abuse its discretion by allowing the amendment.

II

We next turn to Erickson and Buendorf's legal argument that EMC's lack of a contracting license defeats its claim for damages arising from their interference with EMC's prospective business relationship with Best Buy.

We are unimpressed by Erickson and Buendorf's argument that the intended EMC–Best Buy contract cannot provide a basis for recovery because EMC could not have enforced it without a contracting license under California law. We rest our holding on the argument's logical weakness, but we pause to note the incongruity between the message and the messenger: Erickson and Buendorf, who have been found by a jury on largely uncontestable documented evidence to have secretly usurped a business relationship from their employer (using their employer's equipment and on their employer's travel expense) by attempting to secure for themselves a contract that their employer wanted them to secure on its behalf, now claim that their employer is entitled to no relief because the potential contract that Erickson and Buendorf prevented from occurring may have faced enforceability challenges under California law. Audacity is not a ground to reject a legal argument, so we consider its merits.

The district court concluded that the question of illegality is a question of law, and it determined that the defense fails. Whether the district court correctly applied the law to established facts is a question of law subject to de novo review. *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992). Matching the defense against the elements of EMC's legal claims and against the trial evidence, it is easy to conclude that the district court accurately determined that the defense is flawed.

To succeed on its claim that Erickson and Buendorf interfered with its prospective business relations, EMC had to establish that Erickson and Buendorf "intentionally and improperly" interfered with EMC's prospective relationship with Best Buy, and that the interference resulted in pecuniary harm. *Oak Park Dev. Co. v. Snyder Bros. of Minnesota, Inc.*, 499 N.W.2d 500, 505 (Minn. App. 1993) (citation omitted). The jury concluded that EMC could have reasonably made a $38,124.38 profit on the contract for lighting installation, which EMC argued it lost because of Erickson's and Buendorf's interloping. Erickson and Buendorf cite provisions of California law that permit a party who paid an unlicensed contractor to recover their payment, and for a third party to enjoin performance of contract involving an unlicensed contractor. Cal. Bus. & Prof. Code §§ 7031, subd. (b), 7044 (West 2008).

We agree with EMC's argument that because its claim against Erickson and Buendorf pertained to the company's prospective business relationship, the alleged illegality of the unrealized contract does not establish a valid defense to the claim. Erickson and Buendorf provide no legal support for the assertion that illegality of a hypothetical contract prevents recovery for the tort of interference with prospective business relationship simply because the contract's profit provided the basis to determine damages. The tort of interference with prospective business relationship is designed to remedy harm that comes to a business relationship, not harm to an unconsummated contract. *See Oak Park*, 499 N.W.2d at 505 (discussing the cause of action); Restatement (Second) of Torts § 766B, cmt. C (1979) ("Also included [among the protected relations] is interference with a continuing business or other customary relationship not amounting

to a formal contract."). The prospective contract merely provided a reasoned means to measure the harm that Erickson and Buendorf caused the relationship.

Because the focus of the claim is on the value to EMC from the business relationship, we need not determine whether EMC's intended contract with Best Buy would have been illegal as originally conceived. EMC and Best Buy's business arrangement had not taken its final form. Erickson and Buendorf have pointed us to nothing in the record that would support the notion that the alleged legal impediment to the contract would have prevented the intended business relationship. They offer no basis to expect that the parties would have been unwilling or unable to remedy the alleged impediment, and it is easily conceivable that the parties would account for obstacles that might have arisen in the ordinary course of business, such as the discovery that the structure of the original arrangement did not comply with California's licensing laws. For example, upon discovering that EMC could not itself become licensed, it might have formed a subsidiary entity to obtain the necessary license. And there is no evidence in the record that Best Buy would have refused to pay EMC under a lighting or electrical contract—legally enforceable or not. Nor is there any evidence that a third party would have taken legal action to enjoin performance of the contract.

Rightly applied here, what Erickson and Buendorf claim as a legal bar to recovery is actually only a fact, among many, that might bear on whether EMC has proven that Erickson and Buendorf's interference with its relationship with Best Buy injured EMC. The record indicates that both businesses expected to receive the benefit of their bargain,

and it gives no reason to conclude as a matter of law that they could not have achieved that end if Erickson and Buendorf had not interfered.

The record reflects Best Buy's willingness to work with EMC until Erickson and Buendorf's actions chilled that willingness. The chill harmed EMC. Because EMC established the necessary elements, and because the alleged illegality of the proposed arrangement does not preclude recovery as a matter of law, we affirm the district court's judgment with respect to the damages arising from Erickson and Buendorf's interference with EMC's prospective business relationship.

III

EMC contends that district court's procedural and legal decisions deprived it of a fair trial on the issue of damages. It argues that confusion and inconsistencies regarding the special verdict form precluded the jury from properly considering the extent of the damages caused by Erickson and Buendorf's tortious conduct. It claims that if the district court adopted EMC's proposed jury instructions and special verdict form, the inconsistencies would have been avoided. EMC also challenges the district court's refusal to grant a new trial. EMC's challenges do not require reversal for a new trial.

A decision to grant or deny a request for a new trial rests in the district court's discretion unless the denial violated a legal right. *Nuessmeier Elec., Inc. v. Weiss Mfg. Co.*, 632 N.W.2d 248, 253 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). District courts enjoy broad discretion in crafting jury instructions and special verdict questions. *Russell v. Johnson*, 608 N.W.2d 895, 898 (Minn. App. 2000), *review denied* (Minn. June 27, 2000).

EMC's argument concerns the proper measure of damages traceable to interference with EMC's prospective business advantage. With respect to the interference claim, "the 'expectancies' of economic advantage that the law protects are found . . . where the causal relationship between the defendant's acts and the alleged loss is traceable with a fair degree of certainty." 2 Harper et. al., *Harper, James and Gray on Torts* § 6.11, at 405 (3d ed. 2006). The tort protects "the reasonable expectation of economic advantage." *Wild v. Rarig*, 302 Minn. 419, 442–43 n.16, 234 N.W.2d 775, 790–91 n.16 (1975). But remote, conjectural, or speculative damages cannot be the subject of recovery. *Carpenter v. Nelson*, 257 Minn. 424, 428, 101 N.W.2d 918, 921 (1960). Business expectancies must be "reasonably certain" to occur in order to distinguish the cognizable harms from the speculative. *Id.*

EMC suggests that its recovery should not have been limited to the lost profits from the lighting and electrical contracts that never materialized. It had proposed a special verdict form, which the district court rejected, asking the jury only "[w]hat amount of damages would reasonably and adequately compensate EMC" for the tortious conduct, without directing the jury's considerations or constraining the measure of damages to the profit EMC would have realized from any particular contract. EMC highlights, and the district court acknowledged, that EMC had alleged that Erickson and Buendorf's tortious conduct cost EMC much more than the contracting job that Erickson and Buendorf tried to usurp. They had insisted that potentially "their relationship with Best Buy was damaged beyond that." To establish the extent of its harm, EMC focused on the change in revenue it derived from Best Buy, asserting by comparison that Best

Buy paid EMC a total of $1.7 million for work in 2004 and 2005, but only $1,300 in 2006 after Erickson and Buendorf's misconduct.

Whether damages are too speculative is a question that "'should usually be left to the judgment of the trial court.'" *Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 722 (Minn. App. 1998) (quoting *Jackson v. Reiling*, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (1977)). EMC had the burden to introduce evidence of future, specified advantage. Best Buy representatives testified that their company had not granted any similar contracts of the kind that had previously benefited EMC to anyone. The district court appears to have concluded that, except with respect to the specific contracts discussed at trial, EMC's future business with Best Buy was a matter too speculative to submit to the jury. EMC has not pointed to evidence that renders that conclusion unsustainable. We hold that the district court's decision to constrain the jury's bases for the measure was not an abuse of discretion.

EMC also argues that the jury's response on the special verdict form was internally inconsistent and that the district court did not resolve the inconsistency. The jury found that Best Buy would have awarded a contract based on Erickson's bid for the electrical work despite the fact that it contained a markup. But the jury also found that Best Buy would not have permitted the contract to contain a markup. A special verdict form must be construed liberally to give effect to the jury's intention, and "to harmonize all findings if at all possible." *Kelly v. City of Minneapolis*, 598 N.W.2d 657, 662 (Minn. 1999). If the jury's findings can be reasonably reconciled, we must sustain the verdict. *Id.*

The district court construed the jury's responses to these questions to be consistent by reasoning that the jury decided Best Buy "would not have discovered the . . . markup," but that "[t]he jury determined that [EMC] would not have *reasonably* made any profit on the [electrical] contract because no margin would be accepted by Best Buy." That is, the markup would have been earned by EMC, but in an *unreasonable* manner, and so EMC should not be able to recover it. Alternatively, the jury may have concluded that Best Buy would have awarded the contract, but that it *would* have discovered the markup and would not have paid it. On either approach, because the jury's findings can be reasonably harmonized, we give effect to its determination that EMC was not entitled to recover lost profits from the electrical contract.

IV

EMC argues that the district court erred by failing to enter judgment on the jury's finding that Erickson and Buendorf breached a fiduciary duty to EMC. The argument is well taken.

The jury finding that Erickson and Buendorf breached a fiduciary duty to EMC seems supported by the record and is not directly challenged by Erickson and Buendorf. A claimant asserting breach of fiduciary duty must prove that the defendant owed and breached a fiduciary duty. *In re Trusts A & B of Divine*, 672 N.W.2d 912, 917 (Minn. App. 2004). The jury found that EMC proved the necessary elements. The jury found that when Erickson submitted her bid for electrical work at the Best Buy distribution center, she reasonably believed that EMC would have been interested in pursuing that business opportunity. It further found that her bid directly caused EMC to lose the

contract to perform the lighting work, and that Erickson and Buendorf were engaged in a joint enterprise to submit the bid. The jury valued the loss of the lighting contract at $38,124.38, and it valued the loss of the electrical contract at $0 because Best Buy would not have accepted any profit margin on that contract.

Because EMC could recover damages under both tried theories, and because EMC did not prove any damages unique to the fiduciary duty claim, the district court should have entered judgment for breach of fiduciary duty, even though EMC could recover only for the same harm once. *See Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990) (stating that parallel actions may be maintained, but that double recovery for same harm will not be upheld). We therefore remand for the district court to amend its judgment to reflect the legal conclusion that Erickson and Buendorf breached a fiduciary duty to EMC.

V

EMC argues that the district court should have held Erickson and Buendorf responsible for its expert witness costs. A district court does not have discretion to deny reasonable costs and disbursements to a prevailing party, but determining what costs are reasonable is left to the district court's discretion. *Quade & Sons Refrigeration, Inc. v. Minn. Min. & Mfg. Co.*, 510 N.W.2d 256, 260 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994). EMC argues that the expert testimony of a computer forensics specialist was essential to rebut Buendorf's claim that he had not surreptitiously deleted company files, to establish that he had breached his fiduciary duty to EMC, and to address his credibility.

The district court decided that certain expenses of EMC's expert witness were unreasonable because the expert's testimony was unhelpful or irrelevant, and the charges were "out of proportion to the value of any evidence that was produced." It was also not satisfied with the documentation EMC provided to substantiate its costs; the documents did not reflect an hourly rate or hours billed. But the district court did allow some recovery. It capped the expenses for EMC's computer forensics expert at $1,000, while EMC sought to recover $11,604.52. The district court denied only those costs that it determined to be unreasonable or that lacked sufficient support. We hold that the district court acted within its discretion in doing so.

VI

Erickson and Buendorf argue that the judgment against them in the amount of $58,106.28 was calculated incorrectly. The district court reduced EMC's award of $10,189.49 in costs and disbursements to $9,721.41, which it intended to add to the original judgment of $38,124.38. But the district court administrator instead added the revised award to the judgment that already reflected the original award. Erickson and Buendorf argue that the correct amount of the judgment should be $47,845.79, or $38,124.38 plus $9,721.41. EMC's counsel acknowledged at oral argument that a mathematical error was committed, while disputing the calculation offered by Erickson and Buendorf.

This court may modify judgments to correct errors when the parties agree. *Peck v. Aetna Cas. & Sur. Co.*, 404 N.W.2d 2, 4 (Minn. App. 1987), *review denied* (Minn. May 20, 1987). But we generally will not consider matters not argued to and considered by

the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). The parties agree that the judgment was miscalculated and they also agree to the basis for the miscalculation, but because they are at apparent minor odds about the specific appropriate calculation, we remand for the district court to resolve the arithmetic dispute and to amend the judgment accordingly.

Affirmed in part and remanded.